

JOHN BOSCO FERNANDEZ

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v.

THMIL SELVI RAMASAMY & ANOR

HIGH COURT MALAYA, SEREMBAN

B

AHMAD NASFY YASIN JC

[DIVORCE PETITION NO: 33-392-2009]

24 OCTOBER 2011

FAMILY LAW: Divorce - Adultery - Decree nisi in default granted - Whether order proper - Whether adultery must be proved beyond reasonable doubt at trial - Whether wrong to award damages for adultery based on affidavits - Whether damages could be awarded against spouse involved in adultery - Whether decree nisi could be made absolute when application to rehear divorce petition pending - Divorce and Matrimonial Proceedings Rules 1980, rr. 44, 53(1) & (2) & 100 - Law Reform (Marriage and Divorce) Act 1976, ss. 58, 59, 61(2)

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The petitioner was granted a divorce from the first respondent on the ground she had committed adultery with the second respondent. Both respondents failed to attend court on the hearing of the divorce petition ('the petition'). Before the expiry of three months from the date the *decree nisi* was granted, the first respondent applied (encl. 21) to, *inter alia*, set aside the *decree nisi* and have the petition reheard on the ground she did not commit adultery with the second respondent. She also said she had a valid medical certificate from a government hospital to show her failure to attend the hearing of the petition was not intentional. The second respondent also applied (encl. 39) to, *inter alia*, set aside that part of the court's order ordering him to pay the petitioner RM250,000 as special damages for being party to the adultery. He also said he was unaware about the hearing date of the petition and denied having committed adultery with the first respondent.

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Although encl. 21 was filed before the expiry of three months of the date of the *decree nisi* and before the petitioner had applied for it to be made absolute, the court nevertheless issued a decree absolute before encl. 21 was heard. The first respondent contended that the issue of the decree absolute was wrong in law. Both petitioners also said it was wrong for special damages for adultery to have been awarded against them as the petitioner

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A had not produced any evidence of commission of adultery and that, in any event, one could only pray for general damages for adultery as assessed by the court.

Held (allowing encls. 21 and 39 with costs):

- B (1) The *decree nisi* was wrongly made. The allegation of adultery had to be proved beyond reasonable doubt and it was only proper that that should be done in a trial and not obtained by default.
- C (2) There was no need for the first respondent to provide special grounds or exceptional circumstances. The correct principle to follow was that as long as there was good reason to believe the matrimonial offence on which a *decree nisi* had been founded had never been committed, the decree should be set
- D aside.
- E (3) Damages for adultery should not be ordered based on affidavits alone but established in the form of oral testimony, the veracity of which could be tested by cross-examination and re-examination at trial. (para 27)
- F (4) The language of s. 58 of the Law Reform (Marriage and Divorce) Act 1976 was plain: that damages for adultery could only be claimed against the third party, and not the spouse, involved in the adulterous act. (para 26).
- G (5) The issuance of the decree absolute was wrong in law and should be disregarded as it contravened r. 53(1) and (2) of the Divorce and Matrimonial Proceedings Rules 1980. Under r. 53(2) the registrar could only make the *decree nisi* absolute if he was satisfied, *inter alia*, that no application for rehearing was pending. (para 19)
- H (6) Rule 100 of the Divorce and Matrimonial Proceedings Rules 1980 gave wide discretionary power to the court to extend or abridge time limited for doing an act, notwithstanding the time originally limited had expired. The issue of filing two applications, starting with an application for leave followed by an application for extension of time once leave was obtained, was unsustainable and unsupported in law. (para 18)
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Case(s) referred to:

Ahmad Yahaya & Anor v. Ahmad Sulaiman [1972] 1 LNS 4 HC (**refd**)
Arah Cipta Sdn Bhd v. Piala Gagasan (M) Sdn Bhd & Anor [2010] 9 CLJ 964 (**refd**)

Cheah Teong Tat v. Ho Gee Seng & Ors [1975] 1 LNS 8 (**refd**)

Evans v. Bartlam [1937] AC 473 (**refd**)

Ho Yoke Kwei v. Chee Mian Poon [1997] 2 AMR 1531 (**refd**)

Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party) [2001] 2 CLJ 578 HC (**refd**)

Kong Wing Sum v. Public Bank Bhd [2000] 1 CLJ 497 CA (**refd**)

Lim Nyun Yin v. Gan Kim Biow & Ors [1982] 1 LNS 27 OCJ (**refd**)

Lim Siaw Yüing v. Wong Seng & Anor [2009] 5 CLJ 579 HC (**refd**)

Lloyd-Davies v. Lloyd Davies [1947] 1 All ER 161 (**refd**)

Mahindar Singh v. Amanah Saham Pahang Bhd & Anor [1984] 2 CLJ (Rep) 205 HC (**refd**)

Montague v. Montague [1967] 1 All ER 802 (**refd**)

Nash v. Nash [1967] 1 All ER 535 (**refd**)

Rajessselvi Sinnakaruppan v. Batumalay Jeyaram [2001] 4 CLJ 535 HC (**refd**)

Wong Cheng Ping v. Chin Guan Seng [2010] 10 CLJ 743 HC (**refd**)

Yeap Chooi Peng v. P Manogram V Packirisamy [1988] 1 LNS 85 HC (**refd**)

Yew Yin Lai v. Teo Meng Hai & Anor [2007] 5 CLJ 737 HC (**refd**)

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, rr. 44, 53(1), (2), 100

Law Reform (Marriage and Divorce) Act 1976, ss. 58, 59, 61(2)

For the petitioner - M/s Shima & Co

For the 1st respondent - M/s Gunaretnam & Co

For the 2nd respondent - M/s Ganesalingam Vijayaratnam & Aisha Jothilingam

Reported by Ashok Kumar

JUDGMENT

Ahmad Nasfy Yasin JC:

Appeal

[1] Unsatisfied with my decision made in chambers – on 24 June 2011 allowing both encls. 21 and 39, the petitioner now appeals.

A Enclosure 21

[2] This application was filed by the 1st respondent pursuant to r. 44 Law Reform (Marriage and Divorce Proceedings) Rules 1980 and contained the following prayers:

- B** (a) that an extension of time be given to the 1st respondent to file this application;
- (b) that the order dated 7 May 2010 made by this court be set aside whereby a *decree nisi* was granted to the petitioner on the grounds of adultery and which this court had ordered the following:
- C**
- (i) That both the petitioner and the first respondent be responsible to pay RM1,000 per month as education maintenance for the children of the petitioner and first respondent;
- D**
- (ii) That the 1st respondent open an account with any bank for the purpose of the children's education maintenance and the RM1,000 (RM500 from the petitioner and RM500 from the first respondent) is to be deposited into that account;
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- (iii) That custody care and control of the said children be given to both the petitioner and the 1st respondent jointly;
- F**
- (iv) That in the event the children choose to live with the petitioner/1st respondent, then the petitioner/1st respondent will be responsible to bear all expenses for caring and looking after the said children until university level and/or until the said children are independent and capable to fend for themselves;
- G**
- (v) That the property purchased by the petitioner known as No. 489, Jalan Kurau 10, Taman Permai 1, 70200 Seremban, Negeri Sembilan and any other properties purchased by the petitioner shall be owned wholly by the petitioner forever and the 1st respondent is not entitled to claim any share in the said properties of the petitioner;
- H**
- (vi) That the property purchased by the 1st respondent known as No. 38, Jalan Minamah 2, Taman Minamah, Nibong Tebal, Seberang Perai Selatan, Pulau Pinang or any other
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- properties purchased by the 1st respondent shall be owned wholly by the 1st respondent forever and the petitioner has no right to claim, any shares from the said properties of the 1st respondent; A
- (vii) That the 1st respondent is to give 50% of her savings in her saving accounts and fixed account approximately totalling RM250,000 to the petitioner's name; B
- (viii) That the 1st respondent is ordered to pay the legal cost of these proceedings. C
- (c) That the 1st respondent is at liberty to file the reply to the divorce petition in this matter within 21 days after the order herein is given;
- (d) (i) That a rehearing of the petition be allowed on the grounds that the 1st respondent denies all allegations of adultery with the 2nd respondent named therein as the 2nd respondent is the 1st respondent's cousin and is married to the 1st respondent's sister and that the 1st respondent highlights that the proposed reply to the divorce petition attached herein would if accepted will bring a different decision and if by *de novo*, the petition is reheard, it would mean that the petition is dismissed and the reply to the divorce petition is allowed; D E
- (e) That an order for cost of the application be made by this honourable court; F
- (f) Any other further relieves as deem fit by this honourable court.
- Enclosure 39** G
- [3]** This application was filed by the 2nd respondent's application for the following:
- (i) That an extension of time be given to the 2nd respondent to file this application; H
- (ii) That part of the order of this honourable court wherein it is ordered that the 2nd respondent do pay the petitioner the sum of RM250,000 as special damages for adultery be set aside; I
- (iii) That the 2nd respondent be at liberty to file an answer to the divorce petition.

A Chronology Of Events

[4] In order to understand the circumstances under which the application above stated are filed it is apposite to allude to the events that had taken place which can be gleaned from the affidavits filed and the court's records.

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	Date	Events
C	4 September 2009	Petitioner states that he called the 1st respondent at about 12am and asked her to admit that she was having an affair.
D		On the same date at about 8.30am the 1st respondent lodged a police report stating that the petitioner is forcing her to admit that she is having an affair. She also alleged that the petitioner had, on general occasions hit her.
E	24 September 2009	Petitioner wrote an official letter to inform the 1st respondent of his intention to divorce the 1st respondent. In his letter the petitioner had sought that a joint petition be filed and the following terms be agreed upon:
F		(a) 50% of the 1st respondent's salary to be deposited in favour of their children namely Reuben Fernandez and Shurekha Fernandez until completion of their education (1st degree);
G		(b) In the event the two (2) children do not wish to pursue their education then the balance of the money in the account will be returned to the 1st respondent;
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	(c) That the 1st respondent's house in Parit Buntar (No. 38, Jalan Minamah 2, Taman Minamah, Nibong Tebal, Seberang Perai Selatan, Pulau Pinang) will be irrevocably willed to the two (2) children equally;	A
	(d) That the petitioner's house (No. 489, Jalan Kurau 10, Taman Permai 1, Seremban, Negeri Sembilan) together with all things inside the house will be irrevocably willed to the two (2) children equally;	B
	(e) That all moneys saved by both parties for the children through total savings of the 1st respondent's salary in the form F savings accounts in their names or fixed deposits in the 1st respondent's name on behalf of the two (2) children totalling RM200,000 to be held in a Education Trust to be jointly administered by both the parties. In the event of the petitioner's demise prior to the completion of their education, the petitioner nominates Mr John Christopher Fernandez as the petitioner's estate administrator or Messrs Shariff & Som, Advocates & Solicitors (petitioner's solicitors at the time) until the grant of letters of administration is taken;	C
	(f) The petitioner will have custody of the two children and that the 1st respondent is allowed to visit them anytime;	D
	(g) That the 1st respondent is to leave the petitioner's house (No. 489, Jalan Kurau 10, Taman Permai 1, Seremban, Negeri Sembilan) on 14 October 2009; and	E
	(h) That the costs of the whole proceedings and subsequent applications to be borne by the 1st respondent.	F
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A		The petitioner states that he had forwarded the said letter to his daughter to hand the same to the 1st respondent. Upon reading the same, the 1st respondent had agreed to the terms of the letter. Upon receiving this reply, the petitioner states that he had asked his then solicitors, Messrs Shariff & Som to write an official letter and to send the 1st respondent a copy of the joint petition.
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D	8 October 2009	The petitioner states that he had asked the petitioner's daughter to hand over the joint petition to the 1st respondent. Upon reading the said petition, the 1st respondent had stated that she is not agreeable to the contents of the joint petition. The 1st respondent then lodged a police report at about 3.53pm stating that the petitioner is forcing her to sign the joint petition and that an agent of Messrs Shariff & Som was disturbing her by calling her to sign the petition. Again the 1st respondent claimed that the petitioner is a hot-tempered man, and had always hit the 1st respondent. She stated that she did not want the petitioner to disturb her until the divorce proceedings have been filed.
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G	14 October 2009	The 1st respondent had left the petitioner's house together with the children. The petitioner alleged that 1st respondent had coaxed and manipulated the petitioner's son namely Reuben Fernandez to make a false report on the petitioner.
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I	3 November 2009	The date was fixed by the Marriage Tribunal but the 1st respondent did not attend the same. The petitioner attended the said tribunal.

19 November 2009	The date was fixed by the Marriage Tribunal but the 1st respondent did not attend the same. The petitioner attended the said tribunal.	A
3 December 2009	The date was fixed by the Marriage Tribunal but the 1st respondent did not attend the same. The petitioner attended the said tribunal.	B
17 December 2009	The petitioner filed the divorce petition in the Seremban High Court.	C
6 February 2010	The 2nd respondent was served the divorce petition dated 7 December 2009 (encl. 2), affidavit-in-support of the petition affirmed by the petitioner on 17 December 2009 (encl. 3), proposals regarding the children dated 17 February 2009 (encl. 4), acknowledgement of service (encl. 5), notice of proceedings (encl. 6) at his house address. The 2nd respondent's wife accepted the documents and had signed the acknowledgement copy of the letter.	D E
9 February 2010	Attempts to serve the divorce petition dated 7 December 2009 (encl. 2), affidavit-in-support of the petition affirmed by the petitioner on 17 December 2009 (encl. 3), proposals regarding the children dated 17 December 2009 (encl. 4), acknowledgement of service (encl. 5), notice of proceedings (encl. 6) were made at her working place as well as her house. The 1st respondent had accepted the said documents at her working place but refused to sign the acknowledgement copy to signify her acceptance.	F G H

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A		According to the petitioner on the same date at around 7pm, the petitioner's son called and shouted at the petitioner and then ended the call. At around 10.30pm
B		the petitioner said that he again received a call from his son but this time the said son talked to the petitioner calmly. The
C		said son had asked the petitioner not to send any more documents pertaining to the divorce and that the petitioner can call and see them any time.
D	10 February 2010	Petitioner alleged that he tried to call his daughter but was unable to talk to her because the 1st respondent had changed the daughter's number.
E	11 February 2010	The 1st respondent again lodged a police report which the petitioner said was false.
F	10 April 2010	The 2nd respondent was served the affidavit in support of John Bosco Fernandez affirmed on 2 March 2010 (encl. 10), summons-in-chambers dated 04 March 2010 (encl. 11), request to set the matter for trial dated 3 March 2010 (encl. 12), directions for trial dated 3 March 2010 (encl. 13), notice of hearing dated 4 March 2010 (encl. 4) at his house between 4pm to 5pm but according to the petitioner he refused to sign the acknowledgement copy.
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H	13 April 2010	According to the petitioner the court's process server had gone to the 1st respondent's house to serve the affidavit in support of John Bosco Fernandez affirmed on 2 March 2010 (encl. 10), summons-in-chambers dated 4 March 2010 (encl. 11), request to set the matter for trial dated 3 March 2010 (encl. 12), directions for trial dated 3 March 2010
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	(encl. 13), notice of hearing dated 4 March 2010 (encl. 14) at her house at 10.15am. The petitioner states that the 1st respondent had asked the court's process server to leave the said documents and had promised to come to the court the same day between 3pm to 4pm to sign the acknowledgement copy of the receipt of the said documents. However the petitioner alleged that the 1st respondent did not abide by her promise. As a result of the non-appearance of the 1st respondent, the court's process server was instructed to go to the 1st respondent's house again to collect back the documents that were served. However according to the petitioner the 1st respondent lied and told that the court's process server did not go to her house the previous day and as a result of the 1st respondent's action, the court process server got the assistance of two policemen to witness him leaving another copy of the documents.	A
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7 May 2010	The petitioner attended court but the 1st and 2nd respondents failed to attend court despite being served the documents. Order in terms made on the petition.	F
19 July 2010	The 1st respondent was served a sealed copy of the <i>decree nisi</i> dated 7 May 2010 by the court's process server.	G
28 July 2010	The 2nd respondent was served a sealed copy of the <i>decree nisi</i> dated 7 May 2010 by the court's process server.	H
5 August 2010	The 1st respondent filed encl. 21.	I

A	16 August 2010	The petitioner filed and served the affidavit in reply to the supporting affidavit for encl. 21. The petitioner also filed an application for copies of the 1st and 2nd respondents' phone bills from Maxis and other information from Hospital Tuanku Ja'afar, Seremban, employer of 2nd respondent – encl. 25.
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C	30 August 2010	The petitioner filed and served the reply to 2nd respondent's affidavit-in-support. Petitioner filed an application for cost to be paid by both respondents – encl. 36.
D	23 September 2010	The petitioner served encl. 25 and 36 to the solicitors for the 1st and 2nd respondents.

Issues For Determination

- E [5] The issues before the court were *inter alia* as follows:
- i. Whether leave of court is required before any application for extension of time is filed including seeking for rehearing under r. 44 of the Divorce of Matrimonial Proceeding Rules 1980.
- F ii. Whether the order dated 7 May 2010 made by this court can be set aside whereby a *decree nisi* was granted to the petitioner on the grounds of adultery;
- G iii. Whether the petitioner wrongly claimed damages against the 1st respondent and 2nd respondent, which fell foul of ss. 58 and 59 of Law Reform (Marriage and Divorce) Act 1976 ("LRA").

Submission Advanced By Both Parties

- H [6] The counsel for the petitioner argued that the time-frame to apply for a rehearing is six weeks and before any application for extension of time is filed, leave of court is required. In other words, in all applications for extension of time to proceed with a matter, a party must file two applications, namely, first, an application for leave and having obtained an order thereof second,
- I and another application by way of separate application has to be

filed for extension of time. In support of this submission the counsel cited the cases of *Kong Wing Sum v. Public Bank Berhad* [2000] 2 AMR 1825 and *Ho Yoke Kwei v. Chee Mian Poon* [1997] 2 AMR 1531). A

[7] In reply, counsel for both the respondents argued that the issue of filing two separate applications never arose. Both the applications namely encls. 21 and 39 was filed pursuant to r. 44 of the Divorce and Matrimonial Proceedings Rules 1980 as well as s. 61(2) of the Law Reform (Marriage and Divorce) Act 1976. These provisions do not stipulate that there must be separate applications for leave and an extension of time. B C

[8] Reliance was further placed on r. 100 of the Divorce and Matrimonial Proceedings Rules 1980 which reads:

The Court may extend or a bridge the time limited for doing any act upon such terms as may be just and notwithstanding that the time originally limited has expired. D

Thus the court has a wide discretion to allow an extension of time. E

[9] Counsel for the petitioner also submitted that it is trite law that for the 1st respondent to set aside the *decree nisi* and for the extension of time to be granted, the 1st respondent must show good and valid reasons why the *decree nisi* should be set aside and relied on the cases of *Yeap Chooi Peng v. P Manogram a/l V Packirisamy* [1988] 1 LNS 85 and *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743. F

[10] The 1st respondent's counsel in reply submits that the *decree nisi* was made on 7 May 2010 and the 1st respondent's application to set aside the said *decree nisi* was filed on 5 August 2010 which was before the expiry of three months and before the application, by the petitioner for the said *decree nisi* to be made absolute. In addition, it was argued that the petitioner's solicitors informed the respondent's solicitor only on 22 April 2011 that the decree absolute had been issued sometime in October 2010. It is the 1st respondent's submission that the said decree absolute is wrong in law and should be disregarded as it should not have been issued where there is an application to rescind the *decree nisi* and for rehearing of the petition which was filed on 5 August 2010 and pending hearing (see r. 53(1) and (2) of the Divorce and Matrimonial Proceedings Rules 1980). G H I

- A [11] It was further contended by the counsel for the petitioner that the 1st respondent could not be confused as to the legal procedures as she was capable of making a police report, and also being a graduate, having graduated from the Edith Cowan University. Thus ignorance of (procedural) law is not a good
- B defence, (see case *Arah Cipta Sdn Bhd v. Piala Gagasan (M) Sdn Bhd & Anor* [2010] 9 CLJ 964. *Ahmad bin Yahaya & Anor v. Ahmad bin Sulaiman* [1972] 1 LNS 4 and *Cheah Teong Tat v. Ho Gee Seng & Ors* [1975] 1 LNS 8).
- C [12] To this, the counsel for the 1st respondent submitted that the petitioner's contention is severely misconceived. The facts that the 1st respondent had a valid Medical Certificate from Hospital Tuanku Ja'afar Seremban, which is a Government Hospital clearly showed that her non-appearance on the hearing of the petition
- D was not intentional nor was there any intention whatsoever to disrespect this honourable court. Though she was a nursing graduate from Edith Cowan University she is not knowledgeable in the areas of legal procedures, in particular that which involved matrimonial proceedings.
- E [13] In short, it was argued by the 1st respondent that there is no need for the 1st respondent to provide special grounds or exceptional circumstances, but the correct principles to follow are that as long as there is good reason to believe that the
- F matrimonial offence on which a *decree nisi* had been founded had never been committed the *decree nisi* should be set aside regardless, even if the 1st respondent had not resisted it with full knowledge and that if there are grounds for believing the decree had been obtained contrary to the justice of the case. Laches by the
- G 1st respondent will not, in the premises, defeat her application.
- [14] As regard to the claim for damages, it is the submission of the counsel for the petitioner that even though ss. 58 and 59 LRA states that damages can be claimed against any co-respondent, it clearly did not state that damages cannot be
- H claimed against any husband/wives where adultery is an issue. Thus based on the discretion of this honourable court an award was granted to the petitioner whereby the 1st respondent and 2nd respondent were to pay to the petitioner damages of RM250,000 (see case *Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party)* [2001] 2 CLJ 578).
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[15] In this respect, both the respondent's counsel submitted that damages for adultery cannot be special damages but general damages which ought to be assessed by this honourable court. It was argued that there is not an iota of evidence produced by the petitioner to support the allegation of adultery. Thus the award is irregular and ought to be set aside *ex debito justitiae*. (see case *Mahindar Singh v. Amanah Saham Pahang Bhd & Anor* [1984] 2 CLJ (Rep) 205; *Lim Nyun Yin v. Gan Kim Biow & Ors* [1982] 1 LNS 27).

Findings Of The Court

Issue I – Whether Leave Of Court Is Required Before Application For Extension Of Time Is Filed For Rehearing Under r. 44 Of The Divorce And Matrimonial Proceedings Rules 1980

[16] In the present case, both the respondent's application namely encls. 21 and 39 were filed pursuant to r. 44 of the Divorce and Matrimonial Proceedings Rules 1980 as well as s. 61(2) of the LRA. Rule 44 Divorce and Matrimonial Proceedings Rules 1980 states as follows:

44. Application for re-hearing

- (1) An application for re-hearing of a cause, tried by a judge alone (whether in the High Court or a Sessions Court in West Malaysia or a First Class Magistrate's Court in East Malaysia) where no error of the Court at the hearing is alleged, shall be made to a judge.
- (2) Unless otherwise directed, the application shall be made to the judge by whom the cause was tried and shall be heard in open Court.
- (3) The application shall be made:
 - (a) in the High Court, by a notice to attend before the judge on a day specified in the notice; and
 - (b) in the Sessions Court in West Malaysia or a First Class Magistrate's Court in East Malaysia, by notice, and the notice shall state the grounds of the application.
- (4) Unless otherwise directed, the notice must be issued within 6 weeks after the judgment and served on every other party to the cause not less than 14 days before the day fixed for the hearing of the application.

A (5) The applicant shall file a certificate that the notice has been duly served on each person required to be served therewith.

(6) The application shall be supported by an affidavit setting out the allegations on which the applicant relies or exhibiting a copy of any pleading-which he proposes to file if the application is granted, and a copy of the affidavit shall be served on every other party to the cause.

(7) Not less than 7 days before the application is heard, the applicant shall file a copy of a transcript of so much as is relevant of the judge's note of the proceedings at the trial.

C [17] The petitioner contended that in all applications for extension of time to proceed with a matter, a party must file two applications namely an application for leave and having obtained an order, then another application has to be filed for extension of time. With respect, I am unable to agree with his submission as there is no requirement under r. 44 of the Divorce and Matrimonial Proceedings Rules 1980, to that effect.

E [18] In this premise I am of the view that r. 100 of the Divorce and Matrimonial Proceedings Rules 1980 clearly provides a wide discretionary power to the court to extend or abridge the time limit for doing any act upon such terms as may be just notwithstanding the time originally limited has expired. Thus, the issue of filing two separate applications, to be started with an application for leave to be followed by an application for extension of time, once leave is obtained is unsustainable and unsupported in law.

F Issue II – Whether The Court Order Dated 7 May 2010 Made By This Honourable Court Can Be Set Aside Whereby A Decree Nisi Was Granted To The Petitioner On The Ground Of Adultery

G [19] As adverted to earlier, in support his submission, the petitioner's counsel has referred to the cases of *Yeap Chooi Peng v. P Manogram a/l V Packirisamy* [1988] 1 LNS 85 and *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743 as laying down the principles that the 1st respondent must show good and valid reasons. With respect, I am of the view that the said cases can be distinguished from the facts of the present case as the said cases concern the rescinding or setting aside of a decree absolute and not a *decree nisi*. In the present case the *decree nisi* was made on 7 May 2010 and the 1st respondent application to set aside the said *decree nisi* was filed on 5 August 2010, which was before

the expiry of three months and before the application by the petitioner for the said *decree nisi* to be made absolute. Unfortunately before the hearing of the 1st respondent's application to set aside the *decree nisi*, the decree absolute was issued (sometime in October 2010). To my mind the said issuance of the decree absolute is wrong in law and should be disregarded as it clearly contravened r. 53(1) and (2) of the Divorce and Matrimonial Proceeding Rules 1980 which provides:

Rule 53. Decree absolute on lodging notice

- (1) Subject to Rule 54(1), an application by a spouse to make absolute a *decree nisi* pronounced in his favour may be made by lodging with the registrar a notice in Form 8.
- (2) On the lodging of such a notice, the registrar should search the court minutes and if he is satisfied:
 - (a) that no appeal against the decree and no application for rehearing of the cause or for rescission of the decree is pending;

It is clear therefore that under r. 53(2) the registrar can only make the *decree nisi* absolute if he is satisfied, among others, that no application for rehearing is pending. In other words, if an application for rehearing is pending the registrar should not make the *decree nisi* absolute.

In this respect reference may be made to the case of *Lloyd-Davies v. Lloyd Davies* [1947] 1 All ER 161. Lord Greene, MR stated at p. 163.

the right of appeal is absolute and is not to be in any way interfered with, and the divorce judge when an application is made to him to make a decree absolute must inform himself (he would naturally be informed) whether or not there is a pending appeal. If there is a pending appeal, in my judgment, he has no discretion or right to pronounce a decree absolute, because by doing so he would be destroying the right to appeal to this court. Whenever there is an appeal to this court the judge has no option. He must not take any step which would make the appeal ineffective, and the making of the decree absolute would make the appeal ineffective. I am confirmed in that view by this fact. We are told that within the memory of the officials at the Divorce Registry it has never been the practice to put a case in the list to have the decree be made absolute in a case where there is a pending

- A appeal. The cause is simply kept out of the list, and I think that this practice must have originated from a recognition of what I have been saying, that the judge ought not to make a decree absolute when there is known to be an appeal pending.
- B Although Lord Greene, MR was in the particular case speaking in respect of the making of the *decree nisi* absolute when an appeal is pending, I am of the view that the reasoning of the case also applies, *mutatis mutandis*, in cases where an application for rehearing is pending.
- C I also agree with the submission of the respondent that in the present case the *decree nisi* was wrongly made. In this respect reference may be made to the case of *Montague v. Montague* [1967] 1 All ER 802, it was held that if there was good reason to believe that the matrimonial offence on which a *decree nisi* has
- D been founded had never in fact been committed, the *decree nisi* ought to be set aside even if the respondent had stood by and with full knowledge of what was happening, allowed the decree be made without any resistance. And in *Nash v. Nash* [1967] 1 All ER 535 it was held that:
- E if the Court is satisfied that there are substantial grounds for believing the decree to have been obtained contrary to the justice of the case not even gross laches by the applicant, as in *Winter v. Winter* (2) nor deliberate suppression of documents, as in *Peek* (3) will defeat the application.
- F Having considered the authorities cited, I am of the considered view that there is no need for the 1st respondent to provide special ground or exceptional circumstances but the correct principles to follow are that as long as there is good reason to
- G believe that the matrimonial offence on which a *decree nisi* had been founded had never been committed the *decree nisi* should be set aside.
- H [20] In any event I find merit on the 1st respondent counsel's argument, that the 1st respondent did not intentionally absent herself on the said hearing date nor was there any intention whatsoever to disrespect this honourable court as she had a valid Medical Certificate from Hospital Tuanku Ja'afar Seremban.
- I [21] Though the 1st respondent was capable of making a police report it does not in any way provide her with the understanding or the knowledge as to what procedures should be taken in a

matrimonial proceeding, especially so when she has been served with several documents including two separate divorce petitions, one of which was a joint petition for divorce. In this premise, that the contention that the 1st respondent who is a graduate from Edith Cowan University cannot be confused of the matrimonial proceedings is severely misconceived, as she is not knowledgeable in the areas of legal procedures, in particular that which involves matrimonial proceedings. In this regard I could do no better than to repeat the salutary words of Lord Atkin in *Evans v. Bartlam* [1937] AC 473 (HL).

For my part I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of law does not excuse a maxim of very different scope and application here.

[22] The 2nd respondent had filed his application in encl. 39 pursuant to r. 44 of the Divorce and Matrimonial Proceeding Rules 1980 had stated in the affidavit affirmed on 18 August 2010 the following facts:

- (a) He is a lorry driver from Penang;
- (b) He did not know about the hearing date on 7 May 2010 and was not aware that he was cited as a party to the petition;
- (c) He denies having committed adultery with the 1st respondent who is his cousin;
- (d) He is married to one Seetha who is also a relative of the 1st respondent;
- (e) The petitioner's family and his family have close family ties and his family has stayed with the petitioner and the 1st respondent at least 20 times throughout the petitioner's marriage with the 1st respondent.

[23] The above averment are supported by the affidavit of Seethadevi a/p Subramaniam affirmed on 29 September 2010 who is the lawful wife of the 2nd respondent and has deposed the following facts:

- (a) She had called the petitioner and scolded him for dragging her husband the 2nd respondent into his marital problems with the 1st respondent.

- A (b) Unequivocally and clearly told the petitioner that, the 2nd respondent is not having an affair with the 1st respondent.
- (c) She denies having received the divorce petition.
- B (d) She has lodged a police report No: 7010/10 (Seberang Jaya) against the petitioner on the false allegations made by the petitioner against her. This report is exhibited in her affidavit.

- C [24] As for the 2nd respondent I found that the issue to be determined is similar to the 1st respondent's case whereby the allegation of adultery has to be proved beyond reasonable doubt and it is only proper that this be done in a trial proper and/or not obtained by default.

- D In the case of *Lim Nyun Yin v. Gan Kim Biow & Ors* [1982] 1 LNS 27, the learned judge has stated that:

- E Let me now deal with the question of adultery. The burden of proving adultery is on the wife, there being a presumption of innocence on the part of the husband and the two co-respondents. What is the standard of proof required in this case where there is an allegation of adultery? Under our law, adultery is not a criminal offence, but it is certainly a serious matrimonial offence. Learned counsel for the wife, the husband and Ai Lin (Yih Ching unrepresented by counsel) all agreed in their written submissions that adultery must be proved to the satisfaction of the court beyond reasonable doubt. For authorities in support of this proposition, I need only without quoting any passages refer to *Blyth v. Blyth*, *Bastable v. Bastable*, *Ng v. Lim*, *Koh Teng Lam v. Elsie Koh* and *Shanmugam v. Pitchumany*.
- F

- G In the premises it is my judgment that the order obtained by the 1st respondent as well the 2nd respondent by way of default judgment is to be set aside and that adultery must be proven beyond reasonable doubt by the petitioner in a proper trial.

- H *Issue III – Whether The Petitioner Wrongfully Claiming Damages Against The 1st And 2nd Respondent Which Contradicts s. 58 And s. 59 Of LRA*

- I [25] Before me, learned counsel for the petitioner contended that the ss. 58 and 59 Law Reform (Marriage and Divorce) Act 1976 clearly did not state that damages cannot be claimed against any husband/wives, where adultery is an issue.

The counsel for the petitioner relied on a case of *Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party)* [2001] 2 CLJ 578 which is to my mind easily distinguishable with the facts of the present case, as in that case the claim for damages was against a 3rd party for adultery and the claim for damages was made after a full trial. Also in that case the petitioner had admitted to the adulterous relationship between himself and the 3rd party and there was evidence that a child was born out of the adulterous relationship, and that the relationship between the petitioner and the respondent was only strained after the said 3rd party come into the scene.

[26] In my view the language of s. 58 is plain: that the damages for adultery is only claimable against the 3rd party and not the spouse involved in the adulterous act. See *Lim Siaw Yiing v. Wong Seng & Anor* [2009] 5 CLJ 579; *Rajesselvi Sinnakaruppan v. Batumalay Jeyaram* [2001] 4 CLJ 535; *Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party)* [2001] 2 CLJ 578.

[27] I am also of the view that damages for adultery should not be ordered based on the affidavits alone. It is to be established in the form of oral testimony, the veracity of which to be tested by way of cross examination and reexamination at the trial itself (see case *Yew Yin Lai v. Teo Meng Hai & Anor* [2007] 5 CLJ 737).

Conclusion

[28] Based on the reasons adumbrated above, I hereby allowed encls. 21 and 39 with costs.